

HIGH DESERT MULTIPLE-USE COALITION, INC., ET AL.  
KEITH COLLINS

IBLA 94-784, 94-806

Decided January 28, 1998

Appeals challenging the final Rand Mountains-Fremont Valley Management Plan. CA Plan 8320.

Appeal in IBLA 94-806 affirmed in part and dismissed and remanded in part.

Appeal in IBLA 94-784 dismissed and remanded.

1. Administrative Procedure: Administrative Review--  
Appeals: Jurisdiction--Board of Land Appeals

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan. The Board's jurisdiction is limited to decisions implementing approved plans. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director of the BLM, whose decision is final for the Department. Thus, appeals to the Board will be dismissed and the cases remanded to BLM to process as protests pursuant to 43 C.F.R. § 1610.5-2, where BLM fails to provide information related to the proper procedures to follow in order to challenge approval of a final management plan.

2. Administrative Procedure: Administrative Review--  
Appeals: Jurisdiction--Board of Land Appeals

Where BLM publishes a Notice in the Federal Register announcing approval of a final resource management plan, and includes a decision imposing use restrictions on public lands, the decision to implement the use restrictions pursuant to the final plan is appealable to the Board of Land Appeals pursuant to 43 C.F.R. § 4.1(b)(3).

APPEARANCES: Ron Schiller, Chairman, High Desert Multiple-Use Coalition, Inc., Ridgecrest, California; Keith Collins, pro se, Ridgecrest, California; Henri R. Bisson, District Manager, California Desert District Office, Bureau of Land Management, Riverside, California; Dave Slater, Ridgecrest, California, for Intervenor Indian Wells Valley Skeet and Trap Club, Inc.; Joe Kitchens, Ridgecrest, California, for amicus curiae Ridgecrest Chapter 457, Quail Unlimited, Inc.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The High Desert Multiple-Use Coalition, Inc. (High Desert), and Keith Collins have appealed the Decision of the District Manager, California Desert District, Bureau of Land Management (BLM), published at 59 Fed. Reg. 30949-30950 (June 16, 1994), approving the final Rand Mountains-Fremont Valley Management Plan (Final Plan). 1/ The appeal of High Desert is docketed as IBLA 94-784. By Order dated May 16, 1995, this Board granted the motion of Indian Wells Valley Skeet & Trap Club, Inc., to intervene in this appeal, and allowed the Ridgecrest Chapter 457 of Quail Unlimited, Inc., leave to appear in the appeal as amicus curiae. The appeal of Keith Collins is docketed as IBLA 94-806.

In the Statement of Reasons (SOR) supporting their individual appeals, High Desert and Collins take issue with management proposals identified in the Final Plan and argue that BLM failed to give adequate notice of procedures for appealing the Final Plan. 2/ Because the appeals challenge the same decision and raise a common issue of law, we have consolidated them for resolution.

The Final Plan was prepared to conform with the California Desert Conservation Area Plan (1980, as amended), chapter 3, and to comply with the regulations at 43 C.F.R. Part 1600 which prescribe the process for "the development, approval, maintenance, amendment and revision of resource management plans \* \* \*," pursuant to the authority of sections 201 and 202

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1/ The Final Plan is dated August 1993, and the District Manager signed the Record of Decision (ROD) and Finding of No Significant Impact on Feb. 2, 1994. The Federal Register Notice of June 16, 1994, states: "Notice is hereby given that the Rand Mountains-Fremont Valley Management Plan has been approved by the Bureau of Land Management (BLM), California Department of Fish and Game (CDFG) and U.S. Fish and Wildlife Service." 59 Fed. Reg. 30949. The chronology of the Final Plan's approval supports a finding that the Final Plan is not a decision taking a specific action or implementing a decision or action. See California Association of Four Wheel Drive Clubs, Inc., 108 IBLA 140, 141, n.1 (1989).

2/ Intervenor and amicus curiae submitted filings taking issue with specific goals, methods, and management strategies described in the Final Plan and did not appeal the three use restrictions identified at 59 Fed. Reg. 30949-50.

of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1711-1712 (1994). See also 43 C.F.R. §§ 1601.0-1, 1601.0-2, 1601.0-3; Final Plan, ROD at 1.

The purpose of the Final Plan is

to identify the necessary land management actions to enable the Bureau of Land Management (BLM) to meet the goal of ensuring that viable population [sic] or populations of the desert tortoise continue in the Rand Mountains/Fremont Valley Management Area. Since the BLM and California Department of Fish and Game (CDFG) are jointly involved in protecting the desert tortoise, this plan will provide management guidelines for use by both agencies. This plan will form the basis for a Sikes Act agreement, which will allow for enforcement and funding assistance from the CDFG.

(Final Plan at 6.) 3/

In a Biological Opinion dated March 10, 1993, the U.S. Fish and Wildlife Service (USFWS) concluded that the "[Final] Plan is not likely to jeopardize the continued existence of the desert tortoise." (ROD, at 1.) The ROD states: "The Plan will be revised as necessary to conform with the Desert Tortoise Recovery Plan and West Mojave Coordinated Management Plan." (ROD, at 3.) 4/

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3/ The Sikes Act of Sept. 15, 1960, Pub. L. No. 86-797, 16 U.S.C. § 670 (1994), authorized the Secretary of Defense to carry out a program of planning, development, maintenance, and coordination of wildlife, fish, and game conservation, public recreation, and rehabilitation on military reservations in accordance with a cooperative plan agreed upon by the Secretary of Defense, the Secretary of the Interior, and the appropriate State agency in which the reservation is located. S. Rep. No. 934, 93rd Cong., 2d Sess. 1, reprinted in 1974 U.S.C.C.A.N. 5790, 5791. The success of the program encouraged Congress in 1974 to extend the concept and authorize implementation of the program on other public lands throughout the United States. Id. at 5790, 5796; Act of Oct. 18, 1974, section 2; Pub. L. No. 93-452, 88 Stat. 1369. In achieving this purpose, the Secretary of the Interior is required in cooperation with the State agencies to formulate comprehensive plans to develop, maintain, and coordinate programs for the conservation and rehabilitation of wildlife, fish, and game for appropriate public lands under the Secretary's control. 16 U.S.C. §§ 670g, 670h (1994). Such programs would include habitat improvement projects and related activities. Id.

4/ In 1989, the USFWS issued an emergency listing of the desert tortoise as endangered throughout its range and the CDFG listed the desert tortoise as a threatened species in June 1989. On April 2, 1990, the USFWS permanently listed the desert tortoise as a threatened species. (Final Plan at 6.) The Final Plan states: "The BLM will continue to manage the public lands under the principles of multiple use and sustained yield, and will allow uses which are compatible with protection of the desert tortoise population." (Final Plan at 6.)

In its SOR, High Desert objects to item 2 at page 22 of the Final Plan and requests that it be removed. Item 2 is entitled Camping on Private Lands and describes a proposal to develop an agreement with the nearby town and county to regulate off-highway vehicle (OHV) use on private land located adjacent to the management area. (SOR at 2.) Appellant High Desert also objects to a BLM staff proposal at page 21 of the Final Plan that would, subject to formal consultation with the USFWS, close all but 129 miles of road in the management area to OHV's. (SOR at 2.) High Desert also asserts that BLM has emphasized OHV activities in the Final Plan to the detriment of other recreational activities (SOR at 2), and requests that the Final Plan be revised to specifically identify routes to such recreational activities as rockhounding and wildflower viewing. (SOR at 2.) Additionally, High Desert opposes BLM's plan to regulate hunting and requests removal of that issue from the Final Plan. (SOR at 3.) High Desert also asserts that the Final Plan should include the monitoring of all predation of tortoise and exclude a plan, discussed in the Final Plan at pages 24 and 25, to purchase private property to "square boundaries for the management area \* \* \*." (SOR at 3.) Finally, High Desert asserts that BLM should clearly state the total cost of implementing all actions discussed in the Final Plan. (SOR at 4.)

Collins' SOR challenges hunting and target-shooting prohibitions proposed in the Final Plan because he says they are based on "suspect data" and are not tied to a "documented public safety problem." (SOR at 1.) He cites the Final Plan at "V. Management Actions. D. Access, 3. Discussion, page 26" to argue that an attempt should be made to mitigate loss of recreational activity for hunters of small game. (SOR at 1.) Collins also proposes that doves and rabbits be added to the Final Plan's list, at page 15, of important wildlife found in the management area. (SOR at 1.) Collins states that he perceives conflicts in the descriptions of acceptable OHV events as noted at pages 29, 64, and 105 of the Final Plan. (SOR at 1.) He also disputes the assumptions in the Final Plan's resource monitoring study, proposed at Appendix F, page 77, to determine the effects of motorcycle exhaust on tortoise respiratory disease. (SOR at 2.) In addition, Collins asserts that the Technical Review Team of interested non-Government participants who advised in the development of the Final Plan did not include representatives from the hunting community or from Ridgecrest, California, identified by Collins as "the closest large town to the plan area." (SOR at 2.) Collins also asks how 15 guzzlers in the plan area will be maintained when road access to the area is limited. (SOR at 2.) Finally, Collins cites page 103 of the report and alleges a lack of scientific evidence to support propositions in the Final Plan. (SOR at 2.)

The District Manager, California Desert District, BLM, filed Answers to Appellants' SOR's, providing a chronology of the Final Plan development and asserting his belief that the Final Plan was not appealable to this Board but that the three use restrictions identified in the Federal Register Notice of June 16, 1994, were appealable. (Answer to High Desert Appeal, filed Aug. 29, 1994, at 5; Answer to Collins Appeal, filed Sept. 16, 1994, at 1-2.)

[1] As stated, the Final Plan was prepared under the land use planning provisions of FLPMA, 43 U.S.C. § 1712(a), (f) (1994), and the applicable regulations found at 43 C.F.R. Subpart 1610. These regulations, which are binding on the Board, as well as our decisions interpreting those regulations, establish that we have no jurisdiction over approval or amendment of resource management plans. Rather, pursuant to the protest provisions of 43 C.F.R. § 1610.5-2(a)(1), the "decision of the Director [BLM] shall be the final decision of the Department of the Interior." 43 C.F.R. § 1610.5-2(b). Carey Horowitz, 138 IBLA 330, 345 (1997); Southern Utah Wilderness Alliance, 132 IBLA 255, 258 (1995); Petroleum Association of Wyoming, 133 IBLA 337, 341-42 (1995); Wilderness Society, 90 IBLA 221, 224 (1986); Oregon Natural Resources Council, 78 IBLA 124, 127 (1983).

The Rand Mountains-Fremont Valley Management Plan is a document designed to guide and control future management actions and does not take specific action or implement a decision or action. The management actions it identifies are not the type of specific actions or land-use decisions which are appealable to the Board. See California Association of Four Wheel Drive Clubs, Inc., 108 IBLA 140, 142-43 (1989).

The Board's jurisdiction is limited to decisions implementing approved plans. See 43 C.F.R. § 1610.5-3(b). Implementation is the touchstone of the Board's jurisdiction, regardless of the form that such decisions may take, i.e., jurisdiction extends to individual activity plans and resource management plans only when the latter contain both planning and implementing actions. See National Organization for River Sports, 137 IBLA 396 (1997); Deschutes River Landowners Committee, 136 IBLA 105, 107 n.3 (1996); Deschutes River Public Outfitters, 135 IBLA 233, 237 (1996); Petroleum Association of Wyoming, 133 IBLA at 342; Wilderness Watch, 132 IBLA 388, 391-92 (1995); The Steamboaters, 131 IBLA 223 (1994), *aff'd*, Civ. No. 95-6251-HO (D. Oreg. Aug. 16, 1996); Gerry Zamora, 125 IBLA 10, 14 (1992); National Organization for River Sports, 124 IBLA 38 (1992), Reconsideration Denied, Order dated Mar. 25, 1993.

For the most part, all the parties challenge the Final Plan, not specific decisions implementing a resource management plan. These challenges are beyond the jurisdiction of this Board.

Both Appellants complain that the Final Plan failed to inform the public of appeal procedures and criticize, as confusing and misleading, BLM's News Release for June 13, 1994. They also refer to articles published in various newspapers which all contain statements that a 30-day comment period on the ROD ends July 12, 1994. In its answer, BLM states that "[w]hile we do not believe that the Rand Plan itself is appealable, \* \* \* [t]he omission of a statement on appeals procedures from the Record of Decision was an oversight." (BLM responses to Reason 1.) In further response, BLM advises that a briefing on appeal procedures was provided to representatives of all interested parties at the June 1994 Ridgecrest Resource Area Steering Committee meeting. While BLM points to the fact that Appellants' appeals were timely filed as showing that appropriate information was provided, we must disagree.

As a general matter, the Board of Land Appeals has authority to review all decisions issued by BLM relating to the use and disposition of the public lands. 43 C.F.R. § 4.1(b)(3). See 43 C.F.R. § 4.410(a). However, as we have pointed out, the Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a final resource management plan. Because a resource management plan establishes general management policy, its approval is subject only to protest to the Director of the BLM, whose decision is final for the Department.

The regulation at 43 C.F.R. § 1610.5-2 delineates the procedure to be followed in seeking agency review of a resource management plan:

(a) Any person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment. A protest may raise only those issues which were submitted for the record during the planning process.

(1) The protest shall be in writing and shall be filed with the Director. The protest \* \* \* shall be filed within 30 days of the publication of the notice of its effective date.

The regulation further provides that "[t]he Director [BLM] shall promptly render a decision on the protest. The decision shall be in writing and shall set forth the reasons for the decision." 43 C.F.R. § 1610.5-2(a)(3).

Additionally, the regulation provides that "[t]he decision of the Director shall be the final decision of the Department of the Interior." 43 C.F.R. § 1610.5-2(b). Thus, with respect to Appellants' challenge to the Final Plan, BLM should have provided adequate information to enable Appellants to perfect a protest in accordance with the regulation.

Pursuing on their own initiative, though in arguable compliance with the instructions in the Federal Register notice, Appellants provided the California Desert District Office with appeals directed to this Board. A perusal of these "appeals," however, makes it clear that the vast majority of the matters raised were not subject to appeal to this Board but rather were properly raised as a "protest" before the Director. Regardless of the denomination of these documents as "appeals," they should have been treated as "protests" and forwarded to the Director, BLM. See, e.g., Duncan Miller (On Reconsideration), 39 IBLA 312 (1979). Considering the failure of BLM to adequately apprise those who had participated in the development of the Final Plan of their right to further review should they be dissatisfied with the result, we believe it appropriate to refer these "protests," which we deem timely, for review by the Director, with the exception of Collins' protest to the hunting and target-shooting restrictions. This last matter is, as we explain below, properly before the Board.

[2] In addition to the Notice announcing approval of the Final Plan, BLM issued, pursuant to 43 C.F.R. § 8364.1, an Order giving notice of a decision, effective July 18, 1994, imposing use restrictions on public

lands in the Rand Mountains-Fremont Valley Management Area. <sup>5/</sup> Supplementary information in the Notice of June 16, 1994, states that the purpose of the Final Plan and the use restrictions is to provide increased protection for the desert tortoise and its habitat. Under an Interim Notice, dated November 22, 1990, the Rand Mountains-Fremont Valley area was open to restricted use pending approval of the Final Plan. The Interim Notice expired upon publication of the Notice of Approval of the Final Plan. Thus, the Order of June 16, 1994, implemented three use restrictions related to designation of routes of travel, restrictions on use of firearms, and camping restrictions.

The supplementary information correctly noted that the Decision implementing these use restrictions pursuant to the Final Plan was appealable to the Interior Board of Land Appeals in accord with the provisions at 43 C.F.R. § 4.1(b)(3) and 43 C.F.R. § 4.410(a). Id. In his SOR for appeal, Collins objects to implementation of the BLM use restriction numbered 2: "No person may discharge a firearm at any time except shotguns and then only from September 1 through January 31st for the lawful taking of upland game birds in the upland and mountains portion of the area as identified in the [Final] plan." 59 Fed. Reg. 30949.

In his SOR, Collins argues that "BLM's attempts at hunting and target shooting prohibitions are based on suspect data and, absent a documented public safety problem, probably constitute an overstepping of federal regulatory power for public lands, classified as these are." (SOR at 2.)

As stated, supra, the purpose of the Final Plan was to meet BLM's Management Goals related to ensuring that viable populations of the desert tortoise continue. Among the management goals identified were the reduction of and shooting of desert tortoise. (Final Plan at 19.) In response to the allegations and complaints set forth by Collins, BLM explained the rationale behind its Decision:

Biological surveys indicated that part of the decline in the Rand Plan area's desert tortoise population was caused through illegal shooting with rifles and pistols. The BLM Area Manager took the action of closing the area to all shooting, with the exception of upland game bird hunting with shotgun, to control the type of firearms that are causing the problem.

Limiting hunting by shotguns was allowed to continue since studies indicated that tortoises were generally shot with rifles and pistols and not with shotguns. Additionally, the upland game bird hunting season is from September 1 through January 31. During much of this period, desert tortoises are hibernating and less susceptible to being shot.

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<sup>5/</sup> The Order states that "violation of these restrictions is punishable by a fine not to exceed \$1,000 and/or 12 months in jail." 59 Fed. Reg. 30949.

Further, BLM notes that it worked closely with representatives from the CDFG to develop the Final Plan. The CDFG representatives serving on the Rand Plan Technical Review Team participated in meetings and field examination and reviewed available biological data regarding reasons for the decline in the area's desert tortoise population and "recommended and supported the shooting restriction and limitations on hunting as adopted in the Rand Plan."

We find nothing in the record to persuade us that Collins' challenge to BLM's Decision to implement the use restriction has merit. Indeed, we affirm BLM's Decision to implement hunting and discharge of firearm restrictions, as we find the record supports the action as consistent with BLM's Management Goals related to desert tortoise. (Final Plan at 18-25.)

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Collins' appeal of the BLM Decision to implement the hunting and firearm use restriction is affirmed. The appeals of Collins and High Desert to approval of the Final Plan are dismissed, and the cases are remanded to BLM to consider the challenges to approval of the Final Plan as protests to the Director pursuant to 43 C.F.R. § 1610.5-2.

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Gail M. Frazier  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge